

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

9 KEVIN FERNANDEZ,)
10 Plaintiff,) Case No. 3:06-cv-00628-LRH-RAM
11 vs.)
12 STATE OF NEVADA, *et al.*,)
13 Defendants.)

ORDER

14 This is a civil rights action brought *pro se* by Kevin Fernandez. Plaintiff filed a civil rights
15 complaint pursuant to 42 U.S.C. § 1983 (#5). The Court determined that counts one, five, and six of the
16 complaint did not state viable claims for relief, and dismissed those claims with prejudice (#72).
17 Thereafter, the Court granted the plaintiff's motion for leave to amend the complaint (#153). The Court
18 screened plaintiff's second amended complaint (#154), found that counts one and six of the second
19 amended complaint did not state viable claims for relief, and dismissed those claims with prejudice
20 (#155). On May 19, 2009, the Court granted the plaintiff's motion for leave to amend the complaint
21 (#305) and the plaintiff submitted his third amended complaint (#306). The court now screens plaintiff's
22 third amended civil rights complaint.

23 | I. Screening Standard Pursuant to 28 U.S.C. § 1915A

24 The court must screen the complaint pursuant to 28 U.S.C. § 1915A. Federal courts must
25 conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity
26 or officer or employee of a governmental entity. *See* 28 U.S.C. § 1915A(a). In its review, the court must
27 identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim
28 upon which relief may be granted or seek monetary relief from a defendant who is immune from such

1 relief. *See* 28 U.S.C. § 1915A(b)(1),(2). Pro se pleadings, however, must be liberally construed.
 2 *Balistreri v. Pacifica Police Dep't*, 901 F.2d. 696, 699 (9th Cir. 1988). To state a claim under 42 U.S.C.
 3 § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws
 4 of the United States was violated, and (2) that the alleged violation was committed by a person acting
 5 under color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988).

6 In addition to the screening requirements under § 1915A, pursuant to the Prison Litigation
 7 Reform Act of 1995 (PLRA), a federal court must dismiss a prisoner's claim, "if the allegation of
 8 poverty is untrue," or if the action "is frivolous or malicious, fails to state a claim on which relief may
 9 be granted, or seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C.
 10 § 1915(e)(2). Dismissal of a complaint for failure to state a claim upon which relief can be granted is
 11 provided for in Federal Rule of Civil Procedure 12(b)(6), and the court applies the same standard under
 12 § 1915 when reviewing the adequacy of a complaint or an amended complaint. When a court dismisses
 13 a complaint under § 1915(e), the plaintiff should be given leave to amend the complaint with directions
 14 as to curing its deficiencies, unless it is clear from the face of the complaint that the deficiencies could
 15 not be cured by amendment. *See Cato v. United States*, 70 F.3d. 1103, 1106 (9th Cir. 1995).

16 Review under Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v.*
 17 *Laboratory Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure to state a claim
 18 is proper only if it is clear that the plaintiff cannot prove any set of facts in support of the claim that
 19 would entitle him or her to relief. *See Morley v. Walker*, 175 F.3d 756, 759 (9th Cir. 1999). In making
 20 this determination, the Court takes as true all allegations of material fact stated in the complaint, and the
 21 Court construes them in the light most favorable to the plaintiff. *See Warshaw v Xoma Corp.*, 74 F.3d
 22 955, 957 (9th Cir. 1996). Allegations of a pro se complainant are held to less stringent standards than
 23 formal pleadings drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404
 24 U.S. 519, 520 (1972) (per curiam). While the standard under Rule 12(b)(6) does not require detailed
 25 factual allegations, a plaintiff must provide more than mere labels and conclusions. *Bell Atlantic Corp.*
 26 *v. Twombly*, 127 S.Ct. 1955, 1964-65 (2007). A formulaic recitation of the elements of a cause of action
 27 is insufficient. *Id.*, *see Papasan v. Allain*, 478 U.S. 265, 286 (1986).

1 All or part of a complaint filed by a prisoner may therefore be dismissed *sua sponte* if the
 2 prisoner's claims lack an arguable basis either in law or in fact. This includes claims based on legal
 3 conclusions that are untenable (e.g., claims against defendants who are immune from suit or claims of
 4 infringement of a legal interest which clearly does not exist), as well as claims based on fanciful factual
 5 allegations (e.g., fantastic or delusional scenarios). *See Neitzke v. Williams*, 490 U.S. 319, 327-28
 6 (1989); *see also McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

7 **II. Screening of the Complaint**

8 **A. Defendants**

9 Plaintiff has once again named the State of Nevada and the Nevada Department of Corrections
 10 ("NDOC") as defendants in this action. The court has twice previously noted that plaintiff cannot sue
 11 the State of Nevada and NDOC. The Eleventh Amendment bars suits against states, as a state is not a
 12 "person" subject to suit under 42 U.S.C. § 1983. *See Arizonans for Official English v. Arizona*, 520 U.S.
 13 43, 68-69 (1997); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66 (1989); *Hale v. Arizona*, 993
 14 F.2d 1387, 1398 (9th Cir. 1993) (*en banc*). Furthermore, the Eleventh Amendment bars suits against
 15 state agencies as they are considered an "arm of the state" and not a "person" for the purpose of § 1983.
 16 *See Hyland v. Wonder*, 117 F.3d 405, 413 (9th Cir. 1997), *amended*, 127 F.3d 1135 (9th Cir. 1997); *Doe*
 17 *v. Lawrence Livermore Nat. Laboratory*, 131 F.3d 836 (9th Cir. 1997); *Lucas v. Dep't of Corrections*,
 18 66 F.3d 245, 248 (9th Cir. 1995). Therefore, both the State of Nevada and the Nevada Department of
 19 Corrections shall be dismissed from this action.

20 **B. Ground One**

21 Plaintiff's first cause of action claims an Ex Post Facto violation under Article One, Sections
 22 Nine and Ten, of the United States Constitution and Article One, Section Fifteen of the Nevada
 23 Constitution. Plaintiff states the application of NRS 213.1214 to his certification and parole eligibility
 24 is a violation of the Ex Post Facto clause, as the statute cannot be retroactively applied to him.

25 The Court has twice previously dismissed this ground for relief with prejudice. The Ex Post
 26 Facto Clause "is aimed at laws that 'retroactively alter the definition of crimes or increase the
 27 punishment for criminal acts.'" *California Dep't of Corrections v. Morales*, 514 U.S. 499, 504 (1995).

1 There is no ex post facto violation when the law merely alters the method of imposing a penalty and does
 2 not change the quantum of punishment. *Land v. Lawrence*, 815 F. Supp. 1351, 1353 (D. Nev. 1993).
 3 In the instant case, requiring plaintiff to be certified before released on parole does not constitute an
 4 additional punishment. Moreover, while the plaintiff's was sentenced to the possibility of parole, there
 5 is no constitutional right to parole. *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*,
 6 442 U.S. 1, 7 (1979); Nev. Rev. Stat. § 213.10705. Accordingly, plaintiff cannot state a claim for an
 7 Ex Post Facto Clause violation and amendment would be futile. Plaintiff's first cause of action must
 8 therefore be dismissed with prejudice.

9 **C. Grounds Two, Three and Eight**

10 Plaintiff alleges in his second, third, and eighth claims substantive and procedural due process
 11 violations. Plaintiff contends that he has suffered stigmatizing consequences from being labeled as a
 12 high risk sex offender. Plaintiff states that he has a substantive and procedural due process right in not
 13 being labeled as a high risk sex offender. Plaintiff also challenges his ability to present evidence, call
 14 and question witnesses, and generally defend himself at the psychological review panel and parole
 15 hearings.

16 As the Court has previously noted, to the extent that plaintiff claims that, but for these alleged
 17 due process violations, he would be paroled, his claims are barred and his sole remedy is habeas corpus.
 18 See *Heck v. Humphrey*, 512 U.S. 477, 481 (1994); *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Young*
 19 v. *Kenny*, 907 F.2d 874 (9th Cir. 1990). However, to the extent that the plaintiff alleges that the due
 20 process violations affect his consideration for parole eligibility in accordance with the terms of his
 21 sentence, plaintiff's claims do not necessarily challenge the validity of his conviction or continuing
 22 confinement, and therefore the claims are properly brought under § 1983. Accordingly, plaintiff's claims
 23 in his second, third, and eighth causes of action may proceed as they state cognizable claims for relief.

24 **D. Ground Four**

25 In his fourth cause of action, plaintiff claims NRS 213.1214 is unconstitutional on its face and
 26 as applied because the statute does not allow prisoners to speak at the psychological review panel
 27 hearings. Plaintiff states that he has a First Amendment right to speak at the hearing, and to file

1 grievances challenging the panel's decision. The Court previously construed this claim as one
 2 challenging his access to the courts and to petition the government for redress.

3 “‘The right of meaningful access to the courts extends to established prison grievance
 4 procedures.’” *Bradley v. Hall*, 64 F.3d 1276, 1279 (9th Cir. 1995), quoting *Valandingham v. Bojorquez*,
 5 866 F.2d 1135, 1138 (9th Cir. 1999); *Gomez v. Vernon*, 255 F.3d 1118 (9th Cir. 2001). A prisoner
 6 alleging a violation of his right of access to the courts must have suffered an “actual injury.” *Lewis v.*
 7 *Casey*, 518 U.S. 343, 349-50 (1996). Plaintiff has alleged an actual injury, that he was denied parole
 8 due to the denial of his access to the hearing and grievance or appellate process. Accordingly, plaintiff’s
 9 claim in his fourth cause of action states a viable claim for relief and may proceed.

10 **E. Ground Five**

11 In his fifth claim for relief, plaintiff alleges that prison officials improperly applied NRS
 12 213.1214 and AR 813 to him. Plaintiff argues that in applying the statute and administrative regulation,
 13 the prison officials violated Nevada state law. This Court previously determined that, to the extent
 14 plaintiff was asserting a due process violation, the claim could proceed. Accordingly, plaintiff’s fifth
 15 cause of action may proceed.

16 **F. Ground Six**

17 In his sixth cause of action, plaintiff asserts a claim of negligence under state law. Specifically,
 18 plaintiff states that the psychological review panel members had a duty to follow the provisions of NRS
 19 213.1214 and NRS 241.033. Plaintiff contends that the prison officials breached their duty under the
 20 statutes by failing to provide notice and an opportunity to present evidence. Because the claim for
 21 negligence is made under state law, and the Court may exercise supplemental jurisdiction over state law
 22 claims, plaintiff’s claim in his sixth cause of action may proceed.

23 **G. Ground Seven**

24 In his seventh cause of action, plaintiff alleges a claim of retaliation. He contends that at the
 25 psychological review panel hearing, he attempted to speak and present testimony but the prison officials
 26 would not let him. Plaintiff states that each time he objected at the hearing, the officials would tell him
 27 to be quiet, and became increasingly angry with him. Plaintiff contends that he then told the officials
 28

1 that he would file suit against them. In retaliation for plaintiff's threat of suit, plaintiff alleges that the
 2 prison officials changed his VASOR score sheet and his review panel rating to reflect a high risk of
 3 reoffending instead of a low risk.

4 Allegations of retaliation against a prisoner's First Amendment rights to speech or to petition the
 5 government may support a § 1983 claim. *Rizzo v. Dawson*, 778 F.2d 527, 532 (9th Cir. 1985); *See also*
 6 *Valandingham v. Bojorquez*, 866 F.2d 1135 (9th Cir. 1989). Plaintiff must allege that defendants acted
 7 to retaliate for his exercise of a protected activity, and defendants' actions did not serve a legitimate
 8 penological purpose. *See Barnett v. Centoni*, 31 F.3d 813, 816 (9th Cir. 1994); *Pratt v. Rowland*, 65
 9 F.3d 802, 807 (9th Cir. 1995). Plaintiff's claim that the prison officials changed his risk assessment and
 10 score in retaliation for plaintiff's attempts to speak at the psychological review panel hearing and for his
 11 comment that he would file a civil lawsuit states a viable claim for relief. Accordingly, plaintiff's
 12 seventh cause of action may proceed.

13 **III. Conclusion**

14 Plaintiff has stated cognizable due process claims in grounds two, three, five and eight. Plaintiff
 15 also stated a cognizable First Amendment/access to courts claim in ground four. Plaintiff stated a viable
 16 state law negligence claim in ground six. Finally, plaintiff stated a viable claim for retaliation in ground
 17 seven. For the reasons stated above, plaintiff failed to state a viable claim in ground one, which shall
 18 be dismissed with prejudice. Additionally, defendants State of Nevada and the Nevada Department of
 19 Corrections are dismissed.

20 **IT IS THEREFORE ORDERED** that the Clerk of the Court shall **FILE** the Third Amended
 21 Complaint (#306).

22 **IT IS FURTHER ORDERED** that Defendants State of Nevada and the Nevada Department of
 23 Corrections are **DISMISSED**.

24 **IT IS FURTHER ORDERED** that the first cause of action is **DISMISSED** with prejudice.

25 **IT IS FURTHER ORDERED** that the Clerk shall electronically serve a copy of this Order,
 26 along with a copy of Plaintiff's Complaint, to the Office of the Attorney General of the State of
 27 Nevada, c/o Pamela Sharp, Supervising Legal Secretary, 100 North Carson St., Carson City,
 28

1 **Nevada 89701-4717.** The Attorney General shall advise the court within **twenty (20) days** of the date
2 of entry of this order whether they can accept service of process for the named defendants and the last
3 known address under seal of the defendants for which they cannot accept service. If the Attorney
4 General accepts service of process for any of the defendants, such defendant(s) shall file and serve an
5 answer or other response to the complaint within **thirty (30) days** of the date of the notice of appearance
6 of service.

7 **IT IS FURTHER ORDERED** that henceforth, Plaintiff shall serve upon defendants or, if
8 appearance has been entered by counsel, upon the attorney(s), a copy of every pleading, motion or other
9 document submitted for consideration by the court. Plaintiff shall include with the original paper
10 submitted for filing a certificate stating the date that a true and correct copy of the document was mailed
11 to the defendants or counsel for the defendants. The Court may disregard any paper received by a district
12 judge or magistrate judge which has not been filed with the Clerk, and any paper received by a district
13 judge, magistrate judge or the Clerk which fails to include a certificate of service.

14 DATED this 20th day of July, 2009.



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17 LARRY R. HICKS
18 UNITED STATES DISTRICT JUDGE
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